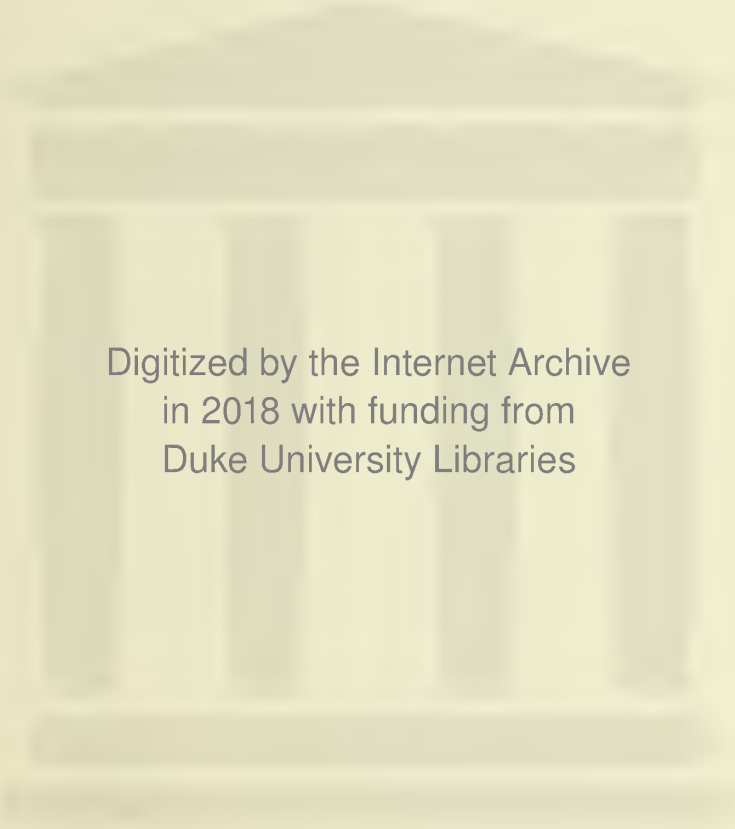

SCOPE AND POSSIBILITIES OF SERVICE PAYMENTS IN LIEU OF PROPERTY TAXES

BY

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THE WAR has made it necessary for the federal government to acquire more and more real estate to house the personnel and activities of the Army and Navy and to house or furnish space for federal departments and agencies engaged in war work of various kinds. On November 18, 1942, the Office of War Information reported that since Pearl Harbor the Army and Navy have bought, or are in the process of buying, private property equal to the combined areas of Massachusetts, Connecticut, Rhode Island, Delaware, the District of Columbia, and four-fifths of New Jersey. Before the war is over, about 30,000,000 acres, equal to the entire area of all New England, will be taken over by the government, according to OWI.[1] This land will be used for army camps, naval bases, air fields, houses, bombing ranges, artillery fields, shipyards, dry docks, and a thousand and one other uses. In Atlantic City 47 hotels containing 11,000 rooms

[1] A federal study released in 1937 estimated that on June 30, 1937, one-fifth of all the real estate in the United States was owned by the federal government. *See* House Document 111, 76th Congress, 1st Session, *Federal Ownership of Real Estate and Its Bearing on State and Local Taxation.* Most of this real estate is located in western states and has never been privately owned. Since 1937 no figures were available until the OWI report and that report does not include real estate acquired between June 30, 1937, and December 7, 1942, when Pearl Harbor was bombed.

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were taken over by the Lands Division of the Department of Justice 48 hours after the War Department requested such action. The world's largest hotel, the Stevens in Chicago, was commandeered in one day.

The War and Navy Departments have taken over some industrial plants for the manufacture of various implements of war. In many cases these industrial plants are not operated directly by Army or Navy personnel, but by regular industrial companies hired to take over the manufacturing operations because of the peculiar industrial experience of such companies. These Army and Navy plants really operate just like private industries except that they pay no local or state taxes on the real estate they occupy.

All of this federal acquisition of real estate means immediate removal of such real estate from state and city tax rolls. The loss in state and municipal revenues from this source will, therefore, mount steadily at a time when municipal costs are naturally rising because of the war emergency. The question arises as to just what can be done to take care of this loss in local and state tax revenues. Should the federal government make payments in lieu of the tax revenues lost through federal realty acquisitions? It is submitted that the government should, and this discussion will be devoted to a consideration of the present status of payments in lieu of taxes on federally owned real estate or public projects. Also, because there has been real progress in connection with the same problem with respect to local public housing projects which are given federal financial assistance, this discussion will summarize developments with respect to such projects even though they, as local projects, belong to a different category altogether than do federal projects.

The Case for Payments in Lieu of Taxes

It is, of course, readily apparent to all that if the federal government moves into one of our large cities, like Detroit for example, and takes over a substantial percentage of the taxable real estate, this will mean that the city of Detroit must raise its tax rate to other real estate owners to compensate for the loss in revenues due to this federal ownership, or the city must tap a new source of revenue to take care of such loss. It seems unfair that Detroit, just because certain real estate located therein is best adapted to federal purposes, should incur a large loss in revenue while other cities, less desirably located from the federal viewpoint, do not lose any revenue as the federal government fails to take any land located in those cities. The war is a national effort and the cost of the war should be borne by the entire nation. It is eminently unfair to require Detroit or any other city to bear a disproportionate share of the cost of the war. The fair solution seems to be payments in lieu of taxes to the localities suffering a loss in local tax revenue because of the taking of land by the federal government. In order that the entire cost of the entire war may be spread over the entire nation, these payments in lieu of taxes should come out of the federal treasury to which all residents of the United States now contribute through the various forms of federal taxation. The same principle of spreading the cost over the entire nation can also be applied to nonwar federal projects which are for the benefit of the entire nation. Where particular federal projects, the Tennessee Valley Authority for example, are income-producing and benefit particular communities, the payments in lieu of taxes should be, and usually are, made out of the earnings of such projects.

In other words, consideration should be given to such relevant factors as the burdens placed upon the local community to service the federal property involved; the benefits—economic or social—derived by the community; the extent to which the property is revenue-producing; the extent to which the property is intended for local or federal advantage; and the extent to which the property may involve a federal subsidy or grant to the local community. The basing of payments in lieu of taxes upon such considerations would make for a much more real uniformity than a policy providing for the same tax payments for all federally owned or federally assisted projects regardless, for example, of the burdens or benefits involved to the local community.

Legal Problems

Under decisions of the Supreme Court of the United States the theory that federal property is immune from state and local taxation still prevails.[2] The Supreme Court has held that the federal government may waive this immunity[3] and Congress has done so in connection with real estate owned by the Reconstruction Finance Corporation and other federal agencies and departments.[4] Some states have adopted statutes exempting all federally owned real estate from state and city taxation.

[2] See *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819); *Jaybird Mining Company* v. *Weir*, 271 U. S. 609 (1926); *Domenech* v. *National Bank of New York*, 294 U. S. 199 (1935). On March 13, 1939, the United States Supreme Court refused to grant a Writ of Certiorari, thereby leaving in effect the decision of the Circuit Court of Appeals that real estate purchased by the United States for a post office site but used as a privately operated bus terminal was not taxable by the city of Springfield, Massachusetts. *City of Springfield* v. *United States*, 99 Fed. (2d) 860.

[3] *Van Allen* v. *Assessors*, 3 Wall. 573 (1866).

[4] Mr. Edward H. Foley, Jr., then General Counsel of the Treasury Department of the United States, in his address "Tax-Exempt Securities and National Defense," in *Municipalities and the Law in Action* (1940), p. 166

The present legal status of payments in lieu of taxes is that in the absence of specific federal legislation such payments may not be made on federally owned property.

Development of Concept of Payments in Lieu of Taxes

The idea of payments in lieu of taxes has developed within the last ten years as the federal government and its agencies have entered the public utility, public housing, and money lending fields heretofore occupied chiefly by private enterprise. The Public Works Administration, Resettlement Administration, Farm Security Administration, United States Housing Authority, Tennessee Valley Authority, Reconstruction Finance Corporation, Home Owners' Loan Corporation, and other federal agencies, by their gradually expanding activities, have focused attention on this subject of payments in lieu of taxes on federally owned or federally aided projects.

All parties concerned—the Congress, the President, the federal departments and agencies, and state and local governments and their taxpayers—seem to agree that payments to compensate states and cities for loss of tax revenues due to federal ownership of real estate should

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states: "A striking development is that Congress has, in many instances consented to the states exercising the power of taxation over government property which would otherwise be exempt. . . . See, for examples of statutes which specifically authorize the levy of taxes by states: the Act of January 26, 1847, 9 Stat. 118; Act of July 10, 1886, 24 Stat. 143 (U. S. C., title 43, sec. 882); Act of August 13, 1894, 28 Stat. 278 (U. S. C., title 31, sec. 425); Act of March 3, 1901, 31 Stat. 1083 (U. S. C., title 25, sec. 319); Act of May 27, 1902, 32 Stat. 275 (U. S. C., title 25, sec. 379); Act of March 11, 1904, 33 Stat. 65 (U. S. C., title 25, sec. 321); Act of May 8, 1906, 34 Stat. 183 (U. S. C., title 25, sec. 349); Act of June 14, 1906, 34 Stat. 263; Act of March 1, 1907, 34 Stat. 1016 (U. S. C., title 25, sec. 412); Act of August, 19, 1937, 50 Stat. 700 (U. S. C., Sup. IV, title 16, sec. 403c-1); Act of August 25, 1937, 50 Stat. 806 (U. S. C., Sup. IV, title 25, sec. 510); and, Act of December 6, 1937, 51 Stat. 4 (U. S. C., Sup. IV, title 12, sec. 1768); National Housing Act Amendments of 1938, 52 Stat. 22 (U. S. C., Sup. V, title 12, sec. 1714); Act of March 8, 1938, 52 Stat. 108 (U. S. C., Sup. V, title 15, sec. 713a-5)."

be made. The difficulty is in arriving at a formula to determine the amount of such payments that should be made in each case. As already indicated, the problem is complicated by the fact that a "uniform" formula in the sense of an arbitrary application of an identical formula to all types of federally owned or federally assisted projects, regardless of either the burdens placed upon, or benefits to, the community as a result of such projects, would appear inappropriate.

The war created the occasion for the great increase in federal ownership of real estate which is indicated by the OWI report cited in the opening paragraphs of this paper. The war also came at a time when no basic formula or principle for payments in lieu of taxes had yet been arrived at, so the problem is now a greater one in every respect. As will be indicated hereinafter, various formulas for payments in lieu of taxes are applied in legislation relating to various federal departments and agencies. The formulation of a basic federal policy is still delayed until the Federal Real Estate Board files its report sometime in 1943.[5]

The most progress toward uniformity in federal policy on payments in lieu of taxes has been made in the field of federally owned or assisted war and public housing. The experience in the public housing field is therefore given major consideration in this study.

The Congress has already authorized funds in excess of $2,000,000,000 for war housing projects ranging from family dwelling units to dormitory apartments, trailers, portable houses, and dormitories for single persons. As of September, 1942, more than 1300 separate housing

[5] *Infra*, p. 149.

projects had been planned. Removal of the land occupied by these projects from local tax rolls means a real revenue loss to the localities in which the projects are located. The Congress and the Federal Public Housing Authority realized this and the sweeping new, liberalized, and uniform policy for the making of payments in lieu of taxes on such projects has been authorized by the Congress and carried out by the FPHA.

The new policy was announced by FPHA on September 29, 1942, and it is expected to improve the tax relations between public housing projects and local governments by (1) giving greater certainty to contributions which may be expected in municipal budgets; (2) equalizing treatment among municipalities and on public housing built under various acts; (3) increasing contributions to the increased costs of municipal services such as schools, health, police, fire, etc., occasioned by the inmigration of war workers to new housing developments. A review of the new regulations on these payments in lieu of taxes, together with a summary of the applicable legislation reveals the far-reaching character of this change in basic federal policy.

Lanham Act War Housing Projects

The basic statute with respect to war housing projects is the so-called "Lanham Act," Public Law 849, 76th Congress, 54 Stat. 1125 (as amended by Public Laws Nos. 42, 137, 409, 522, and 723, 77th Congress). Prior to January 21, 1942, Section 9 of the Act provided that the Federal Works Administrator may enter into agreements to pay annual sums in lieu of taxes to local political sub-

divisions. Public Law 409, approved January 21, 1942, amended this provision to read:

> The Administrator shall pay from rentals annual sums in lieu of taxes to any State and/or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so paid for any year upon such property shall approximate the taxes which would be paid to the State and/or subdivision, as the case may be, upon such property if it were not exempt from taxation, with such allowance as may be considered by him to be appropriate for expenditure by the Government for streets, utilities, or other public services to serve such property. As used in this section the term "State" shall include the District of Columbia.

This provision is now Section 306 of the Lanham Act.

Thus it is incumbent upon the Federal Public Housing Authority (to which Lanham Act projects were transferred under Executive Order No. 9070, February 24, 1942) to pay to local taxing bodies, in lieu of taxes, amounts approximating the taxes which would be paid to such subdivisions if they were not exempt from taxation. This applies to all Lanham Act projects, whether of permanent or temporary construction. It is also immaterial what federal agency, prior to Executive Order 9070, originally undertook the particular project involved. The payments are made directly to the appropriate taxing jurisdiction not later than the date on which taxes are normally due.

Two qualifications may be noted with respect to such payments:

1. Provision is made for such deductions as may be appropriate because of expenditure by the federal government for streets, utilities, or other public services to serve such property. In effect, this means that, to the extent that the federal government itself furnishes services for the project that ordinarily are furnished by the community, it is entitled to an appropriate deduction in its payments in lieu of taxes.

2. The Comptroller General of the United States has ruled that the amendment of January 21, 1942, is not retroactive, so that payments made under Public 409 may cover only the period subsequent to January 21, 1942 (Opinion Comptroller General B-26073, June 19, 1942). With respect to the period prior to that date, the Comptroller ruled that payments must be made pursuant to the agreements entered into under the original Section 9. With respect to any projects upon which taxes would normally have accrued prior to January 21, 1942, but with respect to which no agreements were entered into, the Comptroller ruled that no payments whatsoever may be made with respect to the period up to January 21, 1942.

There is some Lanham Act property under the jurisdiction of the War and Navy Departments. Neither Department has apparently made as yet any payments in lieu of taxes with respect to such property, but it is expected that arrangements will be made for such payments.

Temporary Shelter Projects

Under the provisions of Public Law 9, 77th Congress (supplemented by Public Law 73 and Public Law 353, of the same Congress), $320,000,000 was made available "to provide temporary shelter." Under Executive Order No. 9070, such shelter is being provided by the Federal Public Housing Authority. The same Public Law No. 409, which made mandatory the making of payments in lieu of taxes approximating normal taxation for Lanham Act projects, also provided that:

Any agency designated by the President to provide temporary shelter under the provisions of Public Law Numbered 9, Seventy-seventh Congress, Public Law Numbered 73, Seventy-seventh Congress, or the Third Supplemental National Defense Appropriations Act, 1942 (Public No. 353, 77th Congress), shall have the same powers with respect to the . . . operation, and administration of such temporary shelter as are granted to the . . . Administrator under . . . section 306 of this (Lanham) Act with respect to projects constructed hereunder. . . .

Section 306 is the original Section 9 of the Lanham Act with respect to payments in lieu of taxes, as amended by Public Law 409.

Thus, the Congress has authorized payments in lieu of taxes in the same amount and in the same manner as payments in lieu of taxes with respect to Lanham Act projects. As a matter of policy, the FPHA has determined to make payments in lieu of taxes in connection with all temporary shelter projects upon the same basis as is mandatory with respect to Lanham Act projects.

War Housing Under FPHA

Public Law 671, 76th Congress, is the statute which authorized the USHA (now the FPHA) to use for the provision of war housing, funds available to it under the United States Housing Act of 1937. This Act also authorized the FPHA to revise any contracts for low-rent housing and slum-clearance projects made under the provisions of the United States Housing Act so as to provide that the projects involved will be used for war housing purposes. Thus, the great bulk of the war housing projects being provided under Public Law 671 consists of projects owned and operated by local housing authorities with FPHA financial assistance. With respect to such projects, the FPHA has adopted the following policy:

> Local housing authorities are hereby authorized to make payments in lieu of taxes on all FPHA-aided projects in accordance with the provisions hereunder. The local housing authorities may determine for each project the distribution of such payments among the various taxing jurisdictions, provided that the payments in any year to any taxing jurisdiction shall not be greater than the taxes which would be paid to such jurisdiction if the project were not exempt from taxation, with appropriate allowances, in the case of projects under Public Act,

No. 671, for expenditures by the Federal Government or local housing authority for streets, utilities, or other public services to serve such project. The payments in lieu of taxes made by local authorities in respect to FPHA-aided projects may not exceed the amounts permitted to be paid by local authorities under applicable state or local laws. The amounts to be paid in lieu of taxes in respect to FPHA-aided projects must be approved by the FPHA prior to payment.

Local housing authorities are authorized in respect to any FPHA aided project under Public Act No. 671 to make payments in lieu of taxes which (together with any payments in lieu of taxes contracted for) may equal either (a) Net Revenue before Payments in Lieu of Taxes, or (b) 5% of Actual Shelter Rents, or (c) 1/6 of the difference for any project fiscal year between the maximum amount of FPHA annual contribution permitted by statute (i.e., annual contribution computed at the applicable FPHA interest loan rate plus one-half of one per cent) and the actual FPHA annual contribution which would be required in such year if no payment in lieu of taxes were to be made, whichever of the three amounts is the greatest, but not in excess of the amount of full taxes less appropriate allowances, if any. Such payments may be made after the end of each project fiscal year, and may be paid in respect to revenues accrued subsequent to January 1, 1942. The payments in lieu of taxes hereby authorized in excess of amounts contracted for, may be made only in an amount which will not reduce the value of the local contribution in any year to less than 20% of the actual FPHA annual contribution.

Net Revenue before Payments in Lieu of Taxes as used above shall mean all Revenues (excluding FPHA annual contributions) of the project, less (a) Operating Expenses (including reserves, but excluding all payments in lieu of taxes), and less (b) Debt Service. Debt Service prior to permanent financing shall mean actual interest accrued plus amortization of the development cost at 0.84% per annum; subsequent to permanent financing it shall, for any year, mean the Bond Service Requirement for such year.

Briefly, this formula, which was necessary because of the fact that the contracts for financial assistance of these projects had to be attuned to the provisions of the United States Housing Act, means that local housing authorities are authorized to make payments in lieu of taxes substantially equal to normal taxes or as much thereof as the revenues of such projects will permit.

Since the projects involved are locally owned, the pertinent statutory provisions are local, so that any statutory limitations upon the payments authorized by this FPHA policy would have to be determined by an examination of the local law.

With respect to the small number of projects directly constructed by the FPHA under Public Law 671, the pertinent statutory provision is Section 13(c) of the United States Housing Act which provides:

> The Federal Public Housing Authority may enter into agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof with respect to any real property owned by the Authority. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation thereby.

Pursuant to this authorization, the FPHA has adopted the policy of making payment in lieu of taxes on the same basis as payments are made with respect to Lanham Act projects to the extent that moneys are available therefor.

Army and Navy War Housing Projects

These are projects authorized by Section 201 of the Second Supplemental National Defense Appropriation Act, 1941 (54 Stat. 872, 883, 884, September 9, 1940), which provided $100,000,000 originally for allocation to the War and Navy Departments for the purpose of acquiring land and constructing housing units on or near military or naval establishments or near privately owned industrial plants engaged in military or naval activities.

Public Law 137, 77th Congress (55 Stat. 361, approved June 28, 1941), provides that:

> The departments, agencies, or instrumentalities administering property acquired or constructed under section 201 of the Second Supple-

mental National Defense Appropriation Act, 1941, shall have the same powers and duties with respect to such property and with respect to the management, maintenance, operation, and administration thereof as are granted to the Federal Works Administrator with respect to property acquired or constructed under title I of such Act of October 14, 1940 (the Lanham Act), and with respect to the management, maintenance, operation, and administration of such property so acquired or constructed under such title.

Executive Order 9070 transferred to the FPHA all property constructed under Public Law 781, except housing units located on military or naval reservations, posts, or bases. As in the case of the Public Law 9 and directly operated Public Law 671 projects, the FPHA will as a matter of policy make payments in lieu of taxes on the same basis as those made on Lanham Act projects.

Apparently the War Department does not now operate any Public Law 781 projects. Also to date it does not appear that the Navy Department has made any payments in lieu of taxes with respect to housing projects operated by it under Public Law 781. It does, however, make monthly payments with respect to such property to local taxing units with respect to services rendered in connection with garbage collection, fire and police protection, school facilities, and the like.

The Military Appropriation Act, 1943 (Public Law 649, 77th Congress, July 2, 1942), under a paragraph entitled military posts, authorizes the Corps of Engineers of the Army to construct buildings, *inter alia*, housing. Under this authority numerous housing projects have been programmed and are being constructed by the Army in a number of States. Such projects, when constructed on or off military reservations, become part of such reservation. The Act makes no provision for payments in lieu of taxes with respect to such projects, and information

obtained from the War Department is to the effect that no such payments are made or contemplated.

Low-rent Housing and Slum-clearance Projects

When USHA-aided low-rent housing and slum-clearance projects were first being planned, following the enactment of the United States Housing Act of 1937, it was, of course, necessary, as a matter of sound administrative policy, to assure that the maximum subsidy possible, both federal and local, would be available if needed for the successful operation of such projects. For this reason, the USHA, in its Contracts for Loan and Annual Contributions with local authorities, agreed to pay the maximum federal subsidy authorized by the federal act. Similarly, it was generally required that the local authority obtain cooperation agreements from the local taxing bodies providing for complete tax exemption of the project. Actual operating experience of these projects has since indicated, however, that the maximum federal and local subsidies are not necessary. Also, the advent of the war resulted in a general increase in income levels so that tenants can pay higher rentals than it was originally anticipated that they could afford. As a result, last March the FPHA adopted a policy providing for a proportionate division of all moneys available for reduction of subsidies between the federal government and the local taxing bodies. Several changes have been made since then with respect to the method for determining the exact division of the moneys available for subsidy reduction between the federal and local governments. The latest statement of policy issued by the FPHA in this respect (October 10, 1942) provides that:

> Local housing authorities are authorized in respect to any FPHA-aided low-rent project not under Public Act No. 671 and which was

permanently financed before September 30, 1942, to make payments in lieu of taxes which (together with any payments in lieu of taxes contracted for) may equal either (a) 5% of Actual Shelter Rents or (b) 1/6 of the total amount available (before payments in lieu of taxes) for the reduction of subsidy in any fiscal year, whichever amount is the greater, but not in excess of the amount of full taxes. Such payments may be made after the end of each project fiscal year ending on or after September 30, 1942, and may be paid in respect to revenues accrued from the beginning of such year. The payments in lieu of taxes hereby authorized in excess of amounts contracted for, may be made only out of funds available for the reduction of FPHA annual contributions, and only in an amount which will not reduce the value of the local contribution in any year to less than the sum of 20% of the actual FPHA annual contribution plus a margin of safety equal to 10% of the fixed FPHA annual contribution.

With respect to projects not permanently financed at the time this policy was adopted—that is, projects not financed by September 30, 1942—this policy also provides for

. . . payments in lieu of taxes which (together with any payments in lieu of taxes contracted for) will equal 5% of Actual Shelter Rents from initial occupancy to Bond Date. Such payments may be made after the end of semi-annual or annual periods as determined by the local authority.

This latter provision was necessarily limited to projects not yet permanently financed because of the rights of the bondholders with respect to local contributions for the projects already permanently financed.

As in the case of FPHA-aided Public Law 671 projects, the local housing authorities may determine, for each project, the distribution of the payments among the various taxing jurisdictions. As also in the case of Public Law 671 projects, the payments made in any year to any taxing jurisdiction shall not be greater than the taxes which would be paid to such jurisdiction if the project were not exempt from taxation, and such payments may also not exceed the amounts permitted to be paid by the

local authority under applicable state or local laws. Similarly, the amounts to be paid must be approved by the FPHA prior to payment.

PWA Housing Division Projects

With respect to the so-called PWA projects which were transferred to the USHA, Section 13 (c) of the United States Housing Act, already referred to, also authorizes the payment of sums in lieu of taxes with respect to such projects. In connection with such projects the FPHA has adopted the following policy:

> Local authorities are authorized to make payments in lieu of taxes on PWA Housing Division Projects leased to them, and the FPHA will make payments in lieu of taxes on PWA Housing Division Projects operated directly by it, which payments (together with any payments in lieu of taxes heretofore agreed upon) will equal either (a) 5% of Actual Shelter Rents, or (b) 1/6 of the excess of the Revenues of the project over the Operating Expenses (including reserves, but excluding fixed rent, additional rent, and payments in lieu of taxes), whichever amount is the greater, but not in excess of the amount of full taxes. Such payments may be made after the end of each annual lease period (or federal fiscal year in the case of directly operated projects), and may be paid in respect to revenues accrued subsequent to July 1, 1942. The payments in lieu of taxes hereby provided in excess of amounts heretofore agreed upon, may be made only to the extent that funds are available therefor. If made by a local authority, they shall be distributed by it among the various taxing jurisdictions; shall not exceed the amounts permitted to be paid by it under applicable state or local laws; and must be approved by the FPHA prior to payment.

Farm Security Administration Projects

Prior to Executive Order No. 9070 setting up the National Housing Agency, the Farm Security Administration received $20,000,000 of the temporary shelter Public Law 9 and Public Law 73 appropriation funds. Executive Order No. 9070, however, transferred all such housing to

the FPHA so that the policy adopted by the FPHA with respect to such projects (as indicated above) is applicable to such housing.

With respect to Resettlement Projects or Rural Rehabilitation Projects operated by the FSA, the Bankhead-Black Act (49 Stat. 2036; 40 USCA, Sec. 431 *et seq.*) authorizes payment in lieu of taxes as follows:

> Upon the request of any state or political subdivision thereof, or any other local public taxing unit, in which any such project, described in section 1 (§431 of this title), has been or will be constructed, the Resettlement Administration is authorized to enter in an agreement, and to consent to the renewal or alteration thereof, with such state or political subdivision thereof, or other local taxing unit, for the payment by the United States of sums in lieu of taxes. Such sums shall be based upon the cost of the public or municipal services to be supplied for the benefit of such project or the persons residing on or occupying such premises, but taking into consideration the benefits to be derived by such state or subdivision or other taxing unit from such project.

The Act also provides that:

> The receipts derived from operation of such projects, in addition to the moneys appropriated or allocated for such projects, shall be available for such payments in lieu of taxes and for any other expenditures for operations and maintenance (including insurance) of such projects. . . .

With respect to these purely farm projects which were not transferred from FSA and which it now manages and operates, since the Act requires that the amounts to be paid must be based "upon the cost of the public or municipal services to be supplied . . . taking into consideration the benefits to be derived by . . . taxing unit from such project," it is necessary, with respect to every such project, for findings of fact to be prepared, based upon economic justification showing compliance with the statute. The Comptroller General has ruled that the responsibility for taking into consideration the factors

required by the statute must necessarily be primarily that of the Secretary of Agriculture (21 Comptroller General 74, 1941). In practice it has been found that the amount of the payment is actually comparable to the amount which otherwise would be payable as taxes if the property were subject to taxation. Such payments are timed to the fiscal year of the taxing unit involved.

Defense Homes Corporation

The Defense Homes Corporation has adopted the policy of making payments in the amount equivalent to the amount of taxes which would normally be assessed.

Distinctions in Tax Status of War Housing and Slum-clearance Projects

In order that no confusion may arise because of the policy of payment of full taxes on "war housing projects" with a different formula for payments in lieu of taxes on slum clearance projects the following distinctions are submitted:

1. War housing projects are generally constructed in communities expanding as a result of the location of war industries in the community. This expansion places new and additional burdens upon the community since it must provide necessary municipal services for the in-migrants. It is, therefore, appropriate for the federal government to make payments approximating normal taxation so as not to place upon individual communities burdens due to the national war effort. For the same reason it has been appropriate for the federal government also to make grants-in-aid to provide the capital cost of buildings and facilities such as schools, water works, etc., made necessary by the large influx of in-migrants. Low-rent housing and slum-clearance projects, in contrast, are designed to serve those who have always lived in, and been a part of, the community and to whom the municipality has always been furnishing community facilities and services. Such projects, therefore, do not involve the increase in burden that is pres-

ent in connection with war housing projects, and do not involve taking care of "outsiders."

2. War housing and low-rent housing projects are designed to serve two altogether different income classes. War housing projects will normally serve those in an income class who have always contributed their full share toward meeting the local tax burden. Members of this income class should continue to meet their share of the tax burden. Tenants of low-rent housing and slum-clearance projects, however, consist of families with low income coming from the slums of the community who have never been able to bear their proportionate share of the tax burden, and who at the very same time have also involved a great drain on the revenues of the community because of the high cost to the community of its slum areas. Such projects, therefore, are only serving families whom the community has always had to serve at a substantial loss, and whose incomes have never permitted them to bear their ratable share of the tax burden. In fact, the latest FPHA policy on payments in lieu of taxes, which contemplates that tenants will bear their share of the tax burden to the fullest extent consistent with their income, may mean an increase in revenue to the city from such families. At the same time, the removal of such families from slum conditions means a substantial saving to the city in the cost of the municipal services relating to fire, police, health, etc., with respect to such families, as compared to such cost when they lived in slum dwellings.

3. War housing projects are projects which are owned by the federal government and in which the local community has no proprietary interest. Low-rent housing and slum-clearance projects, on the other hand, are projects owned by the local community in which the municipality, acting through its agent the local housing authority, always has beneficial title and will have full title as soon as it has paid off the capital loan on the project.

4. War housing projects are, as an integral part of the war program, basically for a national purpose. The provision of such housing represents a federal program for a federal purpose with respect to which the local community is assisting the federal government. The converse is true with respect to low-rent housing and slum-clearance projects. These represent projects undertaken by a local public body for the benefit of the local community to eliminate the evils resulting from the slums in that community. The role of the federal government in this case is merely to give assistance to the local community in coping with the problems due to local slum conditions.

5. By very definition, low-rent housing and slum-clearance projects could not exist without subsidy since they are designed to serve those

families who could not afford decent, safe, and sanitary dwellings provided by private enterprise. The most convenient means for the local community to provide a subsidy is by tax exemption. If the local community does not wish to provide a subsidy, the following alternatives are present:

a. That the federal government furnish the entire subsidy. This is impossible under existing federal legislation which provides that any federal subsidy for a *local* project must be complemented by *local* subsidy in the form of tax exemption or cash.

b. That the local community abandon any hope of dealing with the evils arising from its slum areas.

6. With respect to the hundreds of projects already in existence, removal of tax exemption would mean either that the present tenants would have to be evicted and families of much higher income served, thus providing competition with private enterprise or that the federal government take over these projects, in which case they would be exempt from taxation in any event as federal property and would be the property of the federal government and under its sole control.[6] It would also jeopardize the payment of the bonds issued by the local housing authorities to finance the capital cost of the project, since without the federal annual contributions, which cannot be made in the absence of tax exemption, it would, as a practical matter, be impossible for the local housing authority to avoid default on the bonds. This might be very damaging to the credit standing of the communities involved. In addition, it would do injury to those who had relied upon the good faith of the community in purchasing the bonds. The absence of tax exemption would also prevent the sale of further bonds with respect to any project and, therefore, make it impossible to finance any future projects.

7. Tax exemption makes it possible for the local community to receive a federal cash subsidy which may amount to as much as five times the value of the local subsidy. It would be poor administration for the local community to reject substantial federal assistance to clear the slums in the community, because such assistance is condi-

[6] On November 24, 1942, the Federal Public Housing Authority announced that arrangements had been completed for the taking over of $60,000,000 of slum-clearance projects in Ohio on April 1, 1943, unless some means is found to provide tax exemption. This will mean that, unless legislative or judicial relief permitting the resumption of tax exemption can be obtained by that date, such projects will become federal property, thus automatically removing them from local tax rolls. Such action was made necessary by the decision of the Ohio Supreme Court that slum clearance projects, owned by local housing authorities, are not tax exempt. *Columbus Metropolitan Housing Authority* v. *Thatcher*, 7 *Municipal Law Journal* 84, 140 O. S. 38, 42 N. E. (2d) 437 (June 3, 1942).

tioned upon the community's not taxing its own property being operated for its own benefit.

8. It should be noted, in connection with the new policy on payments in lieu of taxes, that, should the incomes of tenants increase so as to make it possible for them to pay higher rentals, the amount of payments in lieu of taxes will automatically also increase. Accordingly, the community is assured that tenants of low-rent housing projects will always bear to the fullest extent possible their share of the tax burden.

Other Departments of the Federal Government and Payments in Lieu of Taxes

Aside from the housing projects referred to above, there is no provision for payments by the Army and Navy of either taxes or payments in lieu of taxes on any of the 30,000,000 acres acquired by these federal departments since the attack on Pearl Harbor—or for that matter, on land acquired by the Army and Navy at any other time. Some action in this field may be expected at an early date, as it is reported that the federal Budget Bureau is making a study of this matter—it seems that the Budget Bureau's study is independent of the work of the Federal Real Estate Board, referred to in a later part of this paper.

As already indicated herein,[7] there has been much legislation authorizing various federal departments and agencies to make payments of taxes or payments in lieu of taxes to state and local governments. The Department of Agriculture and its Farm Security Administration, Forestry Service, and Soil Conservation Service make payments in lieu of taxes to local governments under the authority of various federal statutes. The Department of the Interior makes payments in lieu of taxes out of receipts of its Fish and Wildlife Division from commer-

[7] *Supra*, footnote 4.

cial activities on migratory bird refuges. This particular statute [8] provides for payments to counties of 25 per cent of such receipts for school and road purposes. Certain royalties received from private individuals mining ores on public lands are, under federal statute, shared with states in which such lands are located.[9] Other statutes give states a share of other revenues collected by the Department of the Interior from grazing and similar privileges which are paid for by private persons. Among the recent statutes is that authorizing the payment of $300,000 per year to the states of Arizona and Nevada out of the sale of electric energy on the Boulder Dam project.[10]

The Tennessee Valley Authority was at first required to pay 5 per cent of its gross proceeds from the sale of electric power generated within Tennessee and Alabama to these states,[11] but a later Amendment [12] provides much more generous payments. The Amendment also provides that all states in which the Authority owns property and carries on power operations shall receive payments. These payments in 1941 were 10 per cent of the gross receipts of power sales instead of the original 5 per cent. The Federal Power Commission pays states 37½ per cent of receipts of the Commission from licenses for the use of federal land under its jurisdiction.[13] Real estate owned by national banks has been subject to state and local taxation since 1864.

A large number of corporations created under the Reconstruction Finance Act, as pointed out above, all pay

[8] 49 Stat. 383.
[9] 41 Stat. 450.
[10] 79 Stat. 1542.
[11] 48 Stat. 58.
[12] 54 Stat. 611, 626.
[13] 41 Stat. 1072, 49 Stat. 845.

full taxes on real estate they acquire. The Federal Deposit Insurance Corporation, the Federal Home Owner's Loan Bank Administration, the Farm Credit Administration and the Home Owner's Loan Corporation all pay full taxes on real estate to which they hold title. The HOLC claims to be one of the largest real estate taxpayers in the country.

Federal Legislation

The Congress has not been unattentive to the need of cities for payments in lieu of taxes on real estate taken over by the federal government. The Lanham Act Amendment referred to above demonstrates the most recent congressional policy. Other bills have been introduced in the Congress and a brief review of some of them will illustrate the problems and suggested Congressional solutions.

Taxation of Federal Real Property by Cities and States

Representative James W. Mott of Oregon has introduced a bill (H.R. 6903) providing for taxation by the states and their political subdivisions of certain types of real property acquired for military purposes. This bill is aimed to recover taxes for states which are now lost as soon as the government takes over the property. The bill, now before the Committee on Public Lands, would include all real property in the continental United States which is acquired by purchase, condemnation, or otherwise, by or on behalf of the United States for general military purposes, together with improvements. Such property "shall remain subject to taxation by the State and political subdivision in which such property is lo-

cated, to the same extent, according to its value, as other real property,'' the bill states. The measure would not apply, however, with respect to property where such power of taxation is waived in accordance with state law.

Taxation of Army Property

On July 2, 1942, the Senate passed a bill (S. 2308) providing for continuation of state and local taxes on property acquired by the United States for designated military purposes. This bill was referred to the House Military Affairs Committee on July 6, 1942.

Taxes on Real Property Acquired by the United States

On September 14, 1942, Senator Pepper introduced a bill (S. 2777) providing for taxation by states and their political subdivisions, for the liquidation of any bonded indebtedness, of real property acquired by the United States in the same manner as other real property is taxed. The idea back of this legislation seems to be that with the federal government acquiring large tracts of land, many political subdivisions must raise their tax rates in order to pay for bonded indebtedness secured by tax levies to take care of the loss of revenues from land taken over by the federal government, and the proposed legislation would prevent this.

In addition, the Congress refused to pass upon the proposed bill (H.R. 6955) to give tax exemption to materials used in performing war contracts. This bill had been proposed to escape the effects of the decision in *Alabama* v. *King and Boozer*, 314 U. S. (1941), that without federal legislation making the purchase of such

materials exempt from state and city taxes, those taxes must be paid by federal contractors even though the effect of such payment increased the costs of the federal government on cost-plus-a-fixed fee contracts.

Federal Real Estate Board

On January 14, 1939, the President by Executive Order No. 1939 created the Federal Real Estate Board, and charged the Board with the duty of making a study of the tax problems created by federal ownership of real estate for all purposes. The Board is to make recommendations to the President on future federal policies as to payment of real estate taxes or the making of payments in lieu of taxes on all federally owned real estate. This Board advises that its report and recommendations will be presented to the President in February, 1943.

Conclusions

It is apparent that the rapid increase in federal ownership of real estate and the resulting removal of such real estate from city and state tax rolls has created problems of great national concern. The Congress by legislation and the President by use of his executive powers have both given their attention to these problems. In the public housing field a fair solution has been arrived at in recent weeks, providing for full payments where the project is primarily for the national benefit, and for the highest possible payments consistent with the purposes of the project and the benefits to be derived by the local community in connection with slum-clearance projects, but in other fields no solution has yet been announced.

Payments in lieu of taxes are the best solution to the problems created by tax exemption of federally owned real estate and the future undoubtedly will see an increasing use of such payments to spread the burden of the cost of the national government equitably over the entire nation.